PROPOSED AMENDMENTS BY RICHARD W. WRIGHT TO SECTIONS 101 TO 104 AND 110 OF THE RESTATEMENT THIRD, TORTS: INTENTIONAL TORTS TO PERSONS, DISCUSSION DRAFT (APRIL 4, 2014)

As a preliminary matter, I commend the Reporters on their having in this Discussion Draft already achieved much needed simplifications and clarifications of the relevant provisions in the Restatement Second. However, I believe that further simplifications and clarifications are possible and desirable.

AMENDMENT 1: Amend § 101 (Battery) to state:

§ 101. Battery

~~(1)~~ An actor is subject to liability to another for battery if:

(a) the actor intends to cause a <u>physical</u> contact with the person of the other;
(b) the actor's conduct <u>done with such intent</u> causes such a contact; and
~~(c) the contact is offensive or (ii) causes bodily harm to the other; and~~
~~(d)~~ (c) the other does not ~~actually~~ consent to the ~~contact [or to the conduct that causes the contact]~~ <u>actor's engaging in the conduct with such intent</u>.

~~(2) A contact is offensive if:~~

~~(a) the contact offends a reasonable sense of personal dignity; or~~
~~(b) the actor knows that the contact seriously offends the other's sense of personal dignity, and it is not unduly burdensome for the actor to refrain from causing the contact.~~

These changes, if adopted, should be accompanied by similar changes in the relevant comments.

It likely will be useful to break down Amendment 1 into several parts, offered in sequence as distinct amendments:

<u>Part A</u>. Amend subsection (1)(a) to state: "the actor intends to cause a <u>physical</u> contact with the person of the other"

This amendment clarifies that, as stated in § 101 comment *b*, the contact must be physical, that is, by something tangible, rather than, for example, by noise, odors, radio waves, etc. Otherwise, battery liability would be way too broad, due especially to the knowledge type of intent. Malicious non-physical contacts, such as purposely blowing smoke in someone's face, could either be treated as special exceptions or as being subject to liability under the "prima facie" intentional tort of maliciously caused injury.

Part B. Amend subsection (1)(b) to state: "the actor's conduct done with such intent causes such a contact"

This amendment is needed to clarify that, as in all tort actions, the required legal injury (here, contact with the person of the other) must be caused by the tortious aspect of the defendant's conduct (here, the conduct done with the intent to cause the contact) rather than the actor's conduct as a whole. This is explained in comment *e* at pages 15-16, but should be made explicit in the blackletter.

Part C. Amend existing subsection (1)(d) to state: "the other does not actually consent to the ~~contact [or the conduct that causes the contact]~~ actor's engaging in the conduct with such intent."

This amendment is needed to clarify that the relevant consent need not be consent to the contact (students often get confused on this) but also is not satisfied merely by consent to the actor's conduct, but rather must be consent to the actor's engaging in the conduct with the intent to cause the contact (just as consent by another to an actor's conduct that creates some risk to that other need not involve consent to the realization of the risk, but is not satisfied merely by consent to the conduct that creates the risk, but rather must be consent by the other to the actor's engaging in the conduct with knowledge by the other that the conduct creates that risk).

Part D. Delete subsections (1)(c) and (2), renumber subsection (1)(d) as subsection (1)(c), and amend the new subsection (1)(c) [former (1)(d)] to state: "the other does not ~~actually~~ consent to the ~~contact [or to the conduct that causes the contact]~~ actor's engaging in the conduct with such intent."

The explicit inclusion of the lack of consent requirement in subsection (1)(d) is a great improvement over the Restatement Second, which buried this requirement in a sequence of comments that one had to discover and trace through several separate sections. However, once consent is broadened to include all the various types of consent that are described in Chapter 2 of this draft, the requirement that the contact be "offensive" is redundant. Any intentional contact not authorized by one of the forms of consent described in Chapter 2, which in addition to actual consent encompass socially accepted practices, unavoidable contacts, substituted consent for those permanently or temporarily incapacitated, emergencies, and so forth, is bound to be offensive to the person who suffers the contact and also (absent some other privilege) unjustified. [The few counterexamples offered by the Reporters are all easily covered by either apparent consent or consent implied-in-law to unavoidable contacts.] It therefore would be a very great benefit to students, lawyers, and courts, and further the reporters' laudable goal of simplifying and clarifying the unclear and confusing provisions in the Restatement Second, if justifications for intentional contacts with another's person were limited to the forms of consent described in Chapter 2 and the other privileges described in Chapter 3, rather than layering on the redundant and troublesome concept of offensiveness. Moreover, since every non-privileged intentional touching would be actually "offensive" and actionable, specifying the occurrence of bodily harm as an alternative injury is unnecessary and superfluous. This would further make clear that the basic interest being protected by the battery action is a person's autonomy and dignity with respect to intentional interferences with her person, not physical injury.

Should Part D fail to be adopted, I will offer:

Part E. Amend subsection (2)(b) to state: "the actor knows that the contact ~~seriously~~ offends the other's sense of personal dignity~~, and it is not unduly burdensome for the actor to refrain from causing the contact.~~"

The "unduly burdensome" language is highly ambiguous, bound to spawn debates over its meaning and application, insufficiently protective of a person's sense of personal bodily dignity, and unnecessary. The sorts of reasons or burdens that would justify intentionally causing a contact with another's person despite knowing of her objection to such touching are sufficiently authorized by tentative section 117, Implied-in-Law Consent (or "Constructive" Consent), which encompasses unavoidable intentional touching of another, even if aware of the other's objection to such touching, when it is necessary to do so—for example, to enter or stand in a crowded elevator or subway car. The "seriously" qualifier is objectionable for the same reasons. If a person does not want others, including family and friends, to touch her in the usual, socially accepted way, e.g., by shaking hands or giving her a friendly pat on the shoulder or kissing her on the cheek, she should be able to insist that those others not do so, whether or not it "seriously" offends her sense of personal dignity, and those others should be subject to liability for an infringement of her bodily dignity if they do so knowing of the person's objection, and even more so if they do for the purpose of offending her. Again, the sorts of reasons or burdens that would justify doing so are already authorized by tentative section 117. Not treating such non-privileged intentional touchings as batteries would mean that she would not even be able to use self-help to prevent such touchings without being liable for a battery herself.

AMENDMENT 2: Amend the text in § 101 comment *c*, page 11, lines 8-28, to state: "In addition to requiring voluntariness, battery and assault liability generally require an act. The actor must engage in conduct; a mere omission, a failure to rescue or protect, generally is insufficient for liability. To be sure, one can imagine cases in which battery or assault liability for an omission seems defensible, especially if the omission involves misfeasance (a failure to act to avoid causing injury to another as a result of one's own conduct or things under one's control) rather than nonfeasance (a failure to intervene to aid another who is at risk as a result of others' conduct or things not under one's control). For example, there seems to be little reason not to allow a battery action if the defendant while riding downhill on a sled, or with the cruise control on in a car, notices a person in front of her and, while having the capacity to act to avoid running into the person, fails to take such action with the purpose of causing such contact or knowing that it will occur, whether or not the contact results in bodily harm (as required for a negligence action). Even in cases involving nonfeasance, liability might be proper when there is a duty to act and the purpose rather knowledge type of intent exists. . . . If a jurisdiction does decide to expand battery or assault liability to omissions, it would be wise to impose sensible limits on such liability—for example, limiting liability for nonfeasance to cases in which the actor omits to act for the purpose of causing ~~harm or offense~~ the requisite injury.

AMENDMENT 3: In § 101 comment *e*, page 15 line 6, and elsewhere in this Restatement (e.g., § 103 comment *f*, page 107, line 2), replace "substantially certain" with "nearly certain" or "almost certain."

When this issue came up during the discussion of section 1 of the Restatement Third, Torts, Liability for Physical and Emotional Harm, everyone, including the reporters, agreed that "near certainty" was the proper term, but the reporters stated that they felt they should retain the "substantial certainty" language because the courts use it. However, as I believe all torts professors will attest, this phrase, which is an oxymoron, is highly misleading, since "substantial" suggests merely a substantial probability. It routinely causes confusion and mistakes by students and others. The courts use it only because the Restatement uses it, so to continue to use it is vicious circularity as well as undermining the clarity in terms that it is one of the primary goals of the Restatements. We should correct our prior mistakes, by substituting "near certainty" or "almost certain" for "substantial certainty" in this Restatement that focuses specifically on the intentional torts, with a comment that "substantial certainty" in section 1 of the Restatement Third, Torts, Liability for Physical and Emotional Harm, was intended to have this meaning (indeed, the comments to section 1 sometimes use "certainty" rather than "substantial certainty"). At the very least, there should be an explanation here, as there is in Restatement First § 13 comment on clause (a), that even knowledge of a "very grave risk" is insufficient, and, in the Restatement Second § 8A comment *b*, that the probability must be higher than that required for recklessness, which is described in Restatement Second § 500 as a probability substantially greater than that required for negligence. To be clearest, there should be a statement that the knowledge type of intent requires knowledge or belief that the relevant consequence is certain or almost certain to occur.

AMENDMENT 4: Amend subsection (b) of § 102 (Purposeful Infliction of Bodily Harm) to state: "the other does not consent to ~~the conduct [or to the harm]~~ <u>actor's engaging in the conduct with such purpose</u>."

See the explanation of the similar amendment proposed as Part C of Amendment 1.

AMENDMENT 5: Amend § 103 (Assault) to state:

§ 103. Assault

An actor is subject to liability to another for assault if:

(a) the actor intends to cause the other to ~~apprehend~~ perceive that a ~~harmful or offensive~~ contact with his or her person is imminent;

(b) the actor's conduct done with such intent causes the other to ~~apprehend~~ perceive that a ~~harmful or offensive~~ contact with his or her person is imminent; and

(c) the ~~actor~~ other does not ~~actually~~ consent to the ~~apprehension [or to the conduct causing the apprehension]~~ actor's engaging in the conduct with such intent.

These changes, if adopted, should be accompanied by similar changes in the relevant comments.

Unless all of my proposed amendments to section 101 (included in Amendment 1 above) are accepted, it likely will be useful to break down Amendment 5 into several parts, offered in sequence as distinct amendments:.

Part A. Replace "apprehend" and "apprehension" with "perceive" and "perception" wherever they occur in this Restatement when referring to the required state of mind of a plaintiff in an assault action, and eliminate all references to "fear" except when noting that fear or emotional distress is not required.

The rationale for this amendment is the same as that for Amendment 3 (replacing "substantial certainty" with "near certainty" are "almost certain"). It is agreed that the intended meaning is, as stated in comment *c*, "conscious awareness." Comment *c* also admits that "apprehension" might suggest the wrong idea, "fear," but notes that (1) the First and Second Restatements and many jury instructions use the term "apprehension" and (2) claims that it "has not been misunderstood to require fear." Again, rationale (1) is viciously circular: "apprehension" is a "well-established term" solely because of its use in the First and Second Restatements, and rationale (2) is clearly wrong. I expect that every torts professor will attest that students initially, and too often continually, interpret "apprehension" as fear, even when told that no, it means perception or awareness. Indeed, at the MCG meeting in September, some of the few people present, including a couple of prominent torts professors, insisted that "apprehension" means and should mean "fear." The Restatement's goal of using the clearest possible terms should be implemented here as well. We should correct our past unfortunate use of an unclear and often misunderstood term by using "perception" rather than "apprehension" and eliminating all references to "fear" except when noting that fear or emotional distress is not required.

Part B. Add "done with such intent" to subsection (b) as indicated.

As with the similar amendment proposed in Part B of Amendment 1 for section 101 (battery), this amendment is needed to clarify that, as in all tort actions, the required legal injury (here, perception of an imminent contact with one's person) must be caused by the tortious aspect of the defendant's conduct (here, the conduct done with the intent to cause such perception) rather than the actor's conduct as a whole.

Part C. Amend subsection (c) to state: "the ~~actor~~ other does not actually consent to the ~~apprehension [or to the conduct causing the apprehension]~~ actor's engaging in the conduct with such intent.

The initial "actor" is a typo and should be "other." As for the rest of the amendment, see the explanation of the similar amendment proposed in Part C of Amendment 1 for section 101 (battery).

Part D. Delete "harmful or offensive" in subsections (a) and (b) and delete "actually" in subsection (c).

The rationale for this amendment has been previously stated under Part D of Amendment 1.

AMENDMENT 6: Amend § 104 (Intentional (or Reckless) Infliction of Emotional Harm) to state:

An actor who ~~by extreme and outrageous conduct intentionally or recklessly~~ intends to cause or who knows or should know that his or her conduct creates a high probability of causing significant emotional distress to another and whose extreme and outrageous conduct done with such intent or reckless disregard causes severe emotional distress to the other is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm.

It may be too late for this, given the prior drafting and approval of Restatement Third, Torts: Liability for Physical and Emotional Harm § 46. However, the case law, including the initial leading cases for this tort, many of which involved supposed "practical jokes," do not require conduct done with an intent to cause or knowledge of a high probability of causing severe emotional distress, but rather only significant emotional distress, which ends up causing severe emotional distress through extreme and outrageous conduct.

AMENDMENT 7: Amend § 110 (Transferred Intent) as follows:

Part A. Change "apprehend" to "perceive" wherever the former appears.

The rationale for this amendment has been previously stated under Part A of Amendment 5.

Part B. Delete "harmful or offensive" wherever it occurs.

The rationale for this amendment has been previously stated under Part D of Amendment 1.

Part C. Add to subsection (d): "The relevant tortious consequence must be a direct and immediate consequence of the conduct done with the required intent and the actor's conduct must not have been privileged or mistakenly believed to be privileged."

The scope of liability limitations on application of the transferred intent doctrine are stricter than the usual limitations. There are two important requirements for the transfer of intent, noted in Dan B. Dobbs, The Law of Torts § 40 at 76-77 & n.12 (2000), that should be specified in the blackletter of § 110 as well as the comments.

First, the actor's intent should be transferred only if the actor's intentional conduct was subjectively wrongful, that is, neither was justified by some privilege (for example, self-defense or known consent) or was mistakenly thought to be justified. § 110 comment *d*, page 131, lines 25-27, notes that the intent should not be transferred when the actor's conduct was privileged. However, it also should not be transferred if the actor mistakenly believed that it was privileged, rather than its being "malicious" (as assumed in the Reporters' Notes at 139-140) or at least subjectively wrongful. The underlying issue, as Dobbs and the comments to § 110 state, is the proper extent of legal responsibility for the consequences of one's tortious conduct. Although the courts are willing to use the transferred-intent doctrine to hold an actor liable for an unintended assault or battery if the actor's intentional conduct was culpably wrongful—neither privileged nor mistakenly believed to be privileged—they are not willing to do so if the defendant mistakenly believed that her conduct was privileged or, obviously, if it actually was privileged. For example, assume that the actor reaches out to gently tap a person whom he mistakenly believes to be a friend on the back, and in doing so accidentally makes physical contact with a third person standing next to his assumed friend. The doctrine of transferred intent should not be used to enable the third person to hold the actor liable for a battery.

Second, there is a literal physical and temporal "proximity" limitation on the transfer of intent. The requirement is that there must be a "direct and immediate" causal relationship between the defendant's tortious intentional conduct and the plaintiff's actual injury. While this limitation can be derived from the requirements for the original writ of trespass (see Prosser & Keeton § 8 at 38), it also makes good sense as a matter of principle. The direct and immediate consequence requirement generally precludes transferring the tortious trespassery intent to satisfy the intent requirement for an unintended consequence that was not a direct result of the force intentionally set in motion by the defendant. For example, if C is accidentally shot by B who is justifiably defending herself from an unjustified attack by A, it is unlikely that A's intent to batter B can be transferred to satisfy the intent required for a battery action by C against A: "It is not clear that [A] would be liable for battery by way of transferred intent, although he might be liable for negligence if foreseeable actual harm comes to [C]." Dobbs § 40 at 76, citing as a criminal law analogy Erwin S. Barbre, *Criminal liability where act of killing is done by one resisting felony or other unlawful act committed by defendant*, 56 ALR 3d 239 (1974).